FILED
MAR 7 1951
CHARLES ELMORE CROPL
CLE

IN THE

Supreme Court of the United States

October Term, 1950

No. 523

HARRY GOLDMAN, Petitioner,

vs.

GENERAL MILLS, Inc., a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF

DAVID W. LOUISELL,
IRVING H. GREEN,
Minneapolis, Minnesota,
Counsel for Petitioner.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

INDEX

	Page
I. This case is of interest throughout the United States	2
II. Petitioner is entitled to rely upon the entire lease	3
III. Petitioner's interpretation, and not respondent's, produces a harmonious pattern of construction.	4
IV. The court of appeals invoked factors extrinsic to the lease	5
V. Chief Judge Nordbye and Circuit Judge Sanborn were in accord	6
VI. The court of appeals departed from the accepted and usual course of judicial proceedings	7
Conclusion	9

AUTHORITIES CITED

CASES

Arrowhead Springs Co. v. U. S., 67 Ct. Cls. 211, 233	6
Calich, Estate of, In re, 214 Minn. 292, 297, 8 N. W. (2d) 337	5
Erie R. Co. v. Tompkins, 304 U. S. 64	5
Northwestern F. & M. Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 487, 117 N. W. 825	5
O'Leary v. Brown-Pacific-Maxon, Inc. (U. S. Sup. Ct., No. 267, Oct. Term, 1950, Feb. 26, 1951), 19 U. S. Law Week 4138	5
Sommers v. City of St. Paul, 183 Minn. 545, 551, 237 N. W. 427	5
Woods v. Interstate Realty Co., 337 U. S. 535, 538	5

TEXTBOOK

31 Boston University Law Review 47 (Jan., 1951)	2

IN THE

Supreme Court of the United States

October Term, 1950

No. 523

HARRY GOLDMAN, Petitioner,

vs.

GENERAL MILLS, Inc., a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF

Much of respondent's opposing brief seems appropriate only as argument on the merits. However, certain statements therein might occasion misimpressions as to factors relevant to the grant of certiorari, and these should be corrected briefly.

I.

This Case Is of Interest Throughout the United States.

Respondent argues that the case is not one of general interest or importance, but only concerns the parties (Brief Opposing Certiorari, pp. 43-45).

We think it sufficient to point out that this case, decided only last fall, already has evoked a leading law review article, "An Inductive Approach to the Liability of the Tenant for Negligence," subtitled: *"Goldman, et al. v. General Mills, Inc.",* William Conant Brewer, Jr., 31 Boston University Law Review 47 (January, 1951), in which the author states, "One of the most talked about cases in insurance circles last year was *Goldman v. General Mills, Inc.* * * *" (p. 47), and, "Few cases have made such a deep impression on insurance lawyers as *Goldman v. General Mills, Inc.* * * *" (p. 65).

While petitioner cannot endorse this article's substantive approach to the problem of this case, candor compells him to cite it to the Court to show that unquestionably the case at bar is of great interest throughout the country, and of vital concern to landlords, tenants, insurance companies and the bar.[1]

---

[1]In connection with respondent's contention that the clause "loss by fire and ordinary wear excepted" is not standard in American leases (Brief Opposing Certiorari, pp. 43-45), it is interesting to note this article's statement: "One of the most common provisions in American leases is the covenant to repair or return in good condition, similar to that in **Goldman v. General Mills,** with fire, wear and tear, unavoidable casualty, or damage by the elements the usual exceptions" (31 Boston University Law Review at 50).

II.

Petitioner Is Entitled to Rely Upon the Entire Lease.

We fail to see either logic or equity in respondent's claim (Brief Opposing Certiorari, p. 33) that petitioner is not entitled to invoke the paragraph of the lease providing:

> "There are no understandings or agreements outside of this lease" (R. 89).

This provision has been in the lease from its inception. Its effect is not to be granted or withheld as the contingencies of litigation may dictate.

The position of Chief Judge Nordbye, that under controlling Minnesota law the clause "loss by fire and ordinary wear excepted" clearly does not exculpate respondent from liability for negligent fire, may have obviated the necessity for emphasis of the above quoted paragraph up to the time of reversal below. That reversal is based squarely upon the assumption that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364).

Not until this assumption was made was it important for petitioner to point out that such assumption, besides being unsupported by the evidence, contradicts the lease's own provision that "There are no understandings or agreements outside of this lease." Petitioner emphatically pointed this out in his petition for rehearing (R. 568-569).

It is the court of appeals' assumption that invokes attention to the significance of this provision of the

lease, and it is only fair that such provision be considered along with all the rest of the lease.

III.

Petitioner's Interpretation, and Not Respondent's, Produces a Harmonious Pattern of Construction.

Respondent argues that its construction of the clause "loss by fire and ordinary wear excepted" (R. 80) results in a harmonious interpretation of the lease as a whole (Brief Opposing Certiorari, p. 37). Exactly the contrary is the case.

Respondent altogether overlooks the lease's paragraph on "Liability of Lessor and Tenant," which contains the tenant's clear covenant "to save the lessor harmless" from "any act or neglect of the tenant" (R. 81-82; see Pet. pp. 3-4). Obviously this covenant is consistent only with that construction of the clause "loss by fire and ordinary wear excepted" which excludes negligent fire.

It is therefore Chief Judge Nordbye's and Circuit Judge Sanborn's construction of this clause, and not respondent's, which produces a harmonious pattern.

Respondent's construction puts the lease at war with itself. And such construction produces the absurdity of enabling a lessee to terminate a lease by negligently destroying the premises, in direct contradiction of Minnesota law (see Pet. p. 4, n. 1).

IV.

The Court of Appeals Invoked Factors Extrinsic to the Lease.

Respondent argues that petitioner's invocation of the rule of deference to the trial court on issues of fact, is wrong because the courts below were construing a written contract which involves only "conclusions of law" and "the Court of Appeals in reaching its conclusion was not determining any factual issue" (Brief Opposing Certiorari, p. 38).

But it is obvious that the court of appeals invoked factors extrinsic to the written lease: e.g., the assumed "mutual understanding * * * that loss by fire should be provided against by fire insurance" (R. 539; 184 F. (2d) at 364); petitioner's procurement of insurance; the nature of petitioner's investment; the manner of financing the investment; the circumstances of execution of the lease (R. 543; 184 F. (2d) at 366).

If such extrinsic factors are relevant to decision, we believe it is clear that the inferences to be drawn from them are for the trial court. At least, deference is due to the trial court, which was not accorded by the majority of the court of appeals. Cf. *O'Leary v. Brown-Pacific-Maxon, Inc.* (U. S. Sup. Ct., No. 267, Oct. Term, 1950, Feb. 26, 1951), 19 U. S. Law Week 4138.[2]

---

[2]The Minnesota rule clearly is that, on review, "inferences and conclusions from undisputed facts" as well as "findings on conflicting evidence" are for the trial court, even though "the construction of written or documentary evidence is involved." **Northwestern F. & M. Ins. Co. v. Connecticut Fire Ins. Co.**, 105 Minn. 483, 487, 117 N. W. 825; **Sommers v. City of St. Paul**, 183 Minn. 545, 551, 237 N. W. 427; **In re Estate of Calich**, 214 Minn. 292, 297, 8 N. W. (2d) 337. It would seem that, to effectuate **Erie R. Co. v. Tompkins**, 304 U. S. 64, a court of appeals, when sitting in a diversity case, should accord that deference to the trial court's inferences which the state appellate court would accord, whatever the federal rule in purely federal cases. Cf. **Woods v. Interstate Realty Co.**, 337 U. S. 535, 538, and authorities cited.

V.

Chief Judge Nordbye and Circuit Judge Sanborn Were in Accord.

Respondent contends that, although the only two experienced Minnesota jurists to pass upon this case reached the same conclusion, nevertheless they were in disagreement respecting the proper interpretation of Minnesota law (Brief Opposing Certiorari, p. 20).

It seems to us clear that, to the contrary and as stated by Judge Sanborn,[3] these experienced Minnesota jurists were in complete accord.

In sum, the opinion of Chief Judge Nordbye was that the clause "loss by fire and ordinary wear excepted" does not exculpate from liability for negligent fire, that is, that negligent fire, creating tort liability, is beyond the clause's scope (R. 492). The position of Judge Sanborn, that such clause has to do only with contractual liability and not tort liability (R. 551; 184 F. (2d) at 370) seems to us to be another way of stating the same proposition, or at most, only to carry Judge Nordbye's reasoning one step further, to its logical conclusion.

In other words, the clause has to do only with contractual liability; it does not affect tort liability; therefore it does not exculpate from liability for a negligent act. See *Arrowhead Springs Co. v. U. S.*, 67 Ct. Cls. 211, 233.

---

[3]Circuit Judge Sanborn commenced his opinion by saying: "Had I been the District Judge before whom this case was tried, I am satisfied that my rulings upon the questions presented at the trial would not have differed from those which are challenged by this appeal" (R. 545; 184 F. (2d) at 367).

VI.

The Court of Appeals Departed from the Accepted and Usual Course of Judicial Proceedings.

The short of this case on the merits is simply this: As a matter of common law a tenant is liable for damages resulting from his negligence but is under no duty to make good damage resulting from accidents or the elements. However, a tenant's covenant to keep the premises in good repair, as here (R. 79-80; see Pet. 2-3), enlarges the tenant's liability and renders him liable to restore the premises even though destroyed by causes beyond his control, unless the enlarging covenant is limited by an exception. This, as Circuit Judge Sanborn stated, is the reason for the exception here "loss by fire and ordinary wear excepted" (R. 551; 184 F. (2d) at 370). Such exception does not exculpate from tort liability because it has nothing to do with tort liability. It has to do only with relieving the tenant from contractual liability which, but for the exception, would result from his covenant to keep the premises in good repair.

On the merits, it would be petitioner's function to show this beyond dispute.

The thing presently significant is that the majority of the court below, doubtless motivated by a feeling that the intervenor insurance company should not escape responsibility, determined to reach a conclusion which would prevent such escape, even in the teeth of controlling Minnesota law, as Circuit Judge Sanborn clearly shows (R. 560; 184 F. (2d) at 374; see Pet., p. 26). While, as respects the intervenor insurance company, there may be something in this conclusion of the "feeling for justice," it is grossly unfair and inequitable to

petitioner to make him bear the consequences of the tort feasor's negligence, just because petitioner paid the insurer to assume a portion of the risk.[4]

Most significantly for present purposes, the conclusion was reached not only in the face of the documented showing of the experienced Minnesota jurists, Judge Nordbye and Circuit Judge Sanborn, that Minnesota law is to the contrary, but without according any deference to the trial court's determination of local law; in fact, without citing a single Minnesota or other authority respecting the meaning of the covenant involved.

This is not the accepted or usual course of judicial proceedings. It is a clear departure therefrom.

---

[4]Respondent's footnote (Brief Opposing Certiorari, p. 7) is inaccurate in several particulars, and we think quite misleading. The $142,500 stipulated figure represents the **agreed** damage resulting from the fire (R. 502-503) independent of petitioner's retention of the lot. The boiler installed at petitioner's expense alone cost $1,000; the new roof was in addition (R. 139; the record on this is ambiguous). The income from the property of course had first to be applied to expenses and investment charges.

Respondent indeed makes a strange argument—strange at law or in equity—when in substance it urges that because petitioner may have made a wise investment, he should bear the burden of respondent's negligence.

CONCLUSION

It is respectfully submitted that the decision below is not only contrary to Minnesota law but is a clear departure from the accepted and usual course of judicial proceedings. Therefore the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated Minneapolis, Minnesota, March 3, 1951.

DAVID W. LOUISELL,
IRVING H. GREEN,
Minneapolis, Minnesota,
Counsel for Petitioner.